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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

LUCIANO FABBIO,

Plaintiff, Cross-defendant and  
Appellant,

v.

ZAREH NARGHIZIAN et al.,

Defendants, Cross-complainants,  
and Respondents.

B209868

(Los Angeles County  
Super. Ct. No. BC287492)

APPEALS from orders of the Superior Court of Los Angeles County.  
Kevin C. Brazile, Judge. Affirmed in part and dismissed in part.

Hillel Chodos and Diane Lynn Fella for Plaintiff, Cross-defendant, and Appellant.

Pacific Business Law Group and James M. Jimenez for Defendants, Cross-complainants, and Respondents.

Plaintiff, Luciano Fabbio, appeals from two superior court orders made after remand by this court following a previous appeal by defendants and cross-complainants, Zareh Narghizian and his wife Aida,<sup>1</sup> in a suit and countersuit between joint venturers. (*Fabbio v. Narghizian* (Dec. 28, 2007) B184136 [nonpub. opn.])<sup>2</sup> The orders required Fabbio (1) to advance the expenses of an accounting, subject to recoupment from Narghizian should Fabbio prevail; and (2) to disburse to Narghizian \$187,839.11, comprising a portion of the sale proceeds of land on which Fabbio had been awarded a constructive trust. Fabbio contends that these orders were abuses of discretion in light of the former decision. Narghizian argues that the orders are not appealable, and in any event were proper. We dismiss the appeal from the accounting order, and affirm the order to disburse funds.

## FACTS

### *A. Prior Proceedings.*

In 1994, Fabbio and Narghizian formed an oral joint venture for the purchase and resale of exotic cars. Under the venture, Fabbio was to provide the purchase money, Narghizian would perform much of the buying and selling, and the parties would divide the profits 40 percent to Fabbio and 60 percent to Narghizian. In 2002, Fabbio sued Narghizian and his wife, alleging that Narghizian had fraudulently obtained \$310,000 from Fabbio, on the false premise it was to be used to buy vehicles, and had used it to purchase unimproved real estate in the Mt. Olympus area of Los Angeles (the property). Fabbio sought a constructive trust on the property, and compensatory and punitive damages for fraud, conversion, and breach of fiduciary duty. The Narghizians cross-complained against Fabbio, alleging similar diversions of funds and other practices to the

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<sup>1</sup> We will refer to both Zareh Narghazian, and on occasion him and his wife, as Narghizian.

<sup>2</sup> The opinion in the prior appeal is cited by internal page number, as “Opn.” (See Cal. Rules of Court, rule 8.1115(b).)

detriment of the venture. Among other things, the Narghizians sought an accounting of the venture.

The case was tried to a jury. The trial court directed a verdict against Narghizian on all claims in the cross-complaint except for accounting and another claim, both of which the court retained for decision. By special verdict, the jury found that Narghizian had committed fraud and conversion, damaging Fabbio in the amount of \$310,000, and that Fabbio had proven entitlement to punitive damages. The jury also found that Narghizian had purchased the property with money fraudulently obtained from Fabbio. Following a trial on punitive damages, the jury returned a further verdict of \$290,000

In its judgment, the court stated that the evidence at trial had shown without dispute that Narghizian had purchased the property for \$550,000, using \$252,803.03 of Fabbio's \$310,000 for down payment and escrow charges, with the \$300,000 purchase money balance being carried by the seller with a first trust deed. Months later, Narghizian had discharged that trust deed by paying the seller \$270,000, with the seller allowing Narghizian a discount of the remaining \$30,000 indebtedness. Of the \$270,000 Narghizian paid, \$200,000 came from the sale of another property (the Narghizian home), and the rest from a new first trust deed loan by a bank (bank loan).

The judgment then decreed that Fabbio was entitled to a constructive trust on the property, subject to the bank loan "and further subject to a credit in favor of the defendants Narghizian for the \$200,000 which they utilized as part of the amount required to pay off the original seller carryback . . . ." This trust, the judgment continued, constituted a remedy alternative to \$252,803.03 of the \$310,000 compensatory damages award. Fabbio was entitled to recover the difference (\$57,196.97), plus \$20,191.32 prejudgment interest, and \$290,000 punitive damages. From that total of \$367,388.29, the court subtracted Narghizian's \$200,000 credit "for the amount invested . . . in the real property," and awarded Fabbio a judgment of \$167,338.29. Narghizian was directed to provide Fabbio title to the property, subject to the bank loan.

On Narghizian's appeal, this division (1) affirmed the \$310,000 compensatory damage award; (2) reversed the denial of an accounting, and the directed verdict on

Narghizian's cross-claims for breach of joint venture agreement and breach of fiduciary duty; (3) reversed the punitive damages award, finding it excessive in light of the evidence of Narghizian's net worth; (4) affirmed the imposition of a constructive trust on the entire property, but modified it by allowing Narghizian specific further elements of credit, for monies paid and a discount obtained (the \$30,000 reduction of the seller's trust deed) on the property. The decision also approved the trial court's requirement that Narghizian provide to Fabbio both quitclaim and grant deeds to the property.

With respect to the accounting, the opinion directed that the trial should "decide issues regarding responsibility for the cost of the accounting" before it commenced. (Opn., 14.) Alluding to the potentially substantial cost of the accounting, and the reversal of the punitive damage award against Narghizian "as excessive given his limited assets," we concluded, "If the Narghizians are determined to be responsible for some, or all, of the initial costs of the accounting, their ability to cover these costs should be ascertained." (*Ibid.*) In an accompanying footnote we added, "The record does not justify a similar recommendation directing inquiry into Fabbio's ability to contribute to the cost of the accounting. We also leave the issue of Fabbio's payment, if any, of the cost of the accounting, up to the trial court." (*Id.*, fn. 5.)

## *2. Post-Appeal Proceedings.*

Following remand in early 2008, the parties joined issue in superior court regarding what proceedings should be held, and actions taken, under the appellate decision. Our concern here is with the two orders from which Fabbio has appealed. They respectively concern Narghizian's credit against the constructive trust, and provisional payment for the costs of the prospective accounting.

### *A. The Credit Order.*

In May 2008, having obtained by court order the deeds to the property, Fabbio listed it for sale, and proceeded to sell it, for \$1,350,000. When Narghizian sought to enjoin the sale, the parties stipulated and the court ordered instead that \$350,000 of the sale proceeds would be held in Fabbio's counsel's trust account, to be disbursed only on court order.

At a hearing on July 11, 2008, the court redetermined Narghizian's net credit, by including the items specified in our opinion and subtracting the portion of Fabbio's compensatory damages not covered by the constructive trust, with interest to date. The net credit amounted to \$187,839.11, a sum that neither party presently contests. The court then directed that that sum be disbursed forthwith to Narghizian, from the \$350,000 reserved in counsel's trust account, with Fabbio to retain the rest.

On July 28, 2008, the court signed a written order reflecting its rulings at the July 11, 2008 hearing, including the direction that "Plaintiff's counsel shall disburse forthwith to Zareh Narghizian the sum of \$187,839.11 . . . ." Fabbio filed a notice of appeal from that portion of the order. Fabbio did not disburse the funds to Narghizian; he asserted that the disbursement order was "a mandatory injunction, . . . automatically stayed on appeal."

*B. The Accounting Order.*

At the July 11, 2008 hearing, and in the written order of July 28, 2008 that followed, the court also ruled that a retired judge would be appointed to supervise the accounting required by the partial reversal, and that Fabbio and Narghizian each would advance 50 percent of the costs for the accounting, subject to reallocation after trial. Thereafter the court appointed retired Justice Robert Feinerman as the accounting referee, and he initially invoiced the parties \$9,000. Fabbio remitted his half, but Narghizian did not.

Fabbio then moved ex parte to cancel the order for an accounting. Narghizian responded with an ex parte application to modify the July 28, 2008 order, to require that Fabbio advance all costs of the accounting, again subject to reallocation later. Narghizian's grounds were that, not having been paid the credit funds, he simply could not afford to pay anything for the accounting. In a declaration, he described his low income, greater expenses, lack of property, and substantial indebtedness for past living expenses and for attorney fees, requiring him and his wife to reside at his mother's apartment. The court denied both applications without argument.

About 10 days later, Narghizian filed an ex parte application to vacate the December 1, 2008 trial date and enlarge the discovery cut-off. Among the reasons given was Narghizian's inability to pay for the accounting. Narghizian reiterated that the court had ordered equal division of the accounting costs at a time when Narghizian was to receive the \$187,839.11 from plaintiff's counsel. Narghizian's accompanying declaration restated his financial status, and his inability to pay his share of the accounting costs without those funds.

After receiving opposition and hearing argument, the trial court granted Narghizian's application, vacating the trial date and setting a subsequent trial setting conference. In addition, the court ordered that Fabbio would pay 100 percent of the cost of the accounting, but could recover it if he prevailed. On October 29, 2008, the court signed a written order, modifying its July 28 order to provide that Fabbio would advance 100 percent of the accounting cost, "subject to reallocation by the Court pursuant to an award of costs after trial. The costs of the accounting shall be recoverable by Fabbio if he is deemed to be the prevailing party after trial."

On November 17, 2008, Fabbio filed a notice of appeal from the accounting costs provision of the October 29, 2008 order. We consolidated that appeal with the appeal from the July 28, 2008 order directing the release of funds to Narghizian.

### **DISCUSSION**

We first address Narghizian's jurisdictional contention, that the orders from which Fabbio has appealed are not appealable. Plainly, neither the credit order nor the accounting order constitutes a final judgment in the case, appealable under Code of Civil Procedure section 904.1, subdivision (a)(1). Several claims and remedies – including punitive damages, the accounting, and the remainder of the cross-complaint – must be resolved before final judgment in the action may be rendered.<sup>3</sup>

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<sup>3</sup> "Where a complaint and cross-complaint involving the same parties have been filed, there is no final, appealable judgment until both have been resolved." (*ECC Construction, Inc. v. Oak Park Calabasas Homeowners Assn.* (2004) 122 Cal.App.4th 994, 1002.)

Narghizian further contends that the orders are not appealable as final orders on collateral matters. It is established that an order for payment of money that is final and concerns a matter collateral to the main issues in the case may be appealed. (E.g., *Serrano v. Stefan Merli Plastering Co.* (2008) 162 Cal.App.4th 1014, 566-567.) Under this doctrine, an order is final if no further proceedings on the subject are necessary. (E.g., *Steen v. Fremont Cemetery Corp.* (1992) 9 Cal.App.4th 1221, 1228.) And the order is collateral if it does not involve or affect determination of the merits of the action. (*Id.* at p. 1227.)

We agree with Narghizian that the accounting order does not qualify as an appealable collateral order. First, it is not final: the order contemplates further proceedings before responsibility for payment of the costs of the accounting is finally assigned. Second, the order is not collateral, because it not only concerns the determination of a pending claim for relief, but also is necessary to the resolution of that claim. (See *Steen v. Fremont Cemetery Corp.*, *supra*, 9 Cal.App.4th at pp. 1227-1228.)

Fabbio contends that the accounting order (and also the credit order) is yet appealable as an injunction, under Code of Civil Procedure section 904.1, subdivision (a)(6). We disagree. That provision, which allows appeals from orders granting, denying, dissolving, or refusing to dissolve injunctions, generally concerns restraining orders and injunctions pursued as equitable remedies, as under Code of Civil Procedure section 525 et seq. (See Eisenberg et al., *Cal. Practice Guide: Civil Appeals & Writs* (Rutter 2009) ¶¶ 2:128-2:133, pp. 2-67–2-70 (Eisenberg); 9 Witkin, *Cal. Procedure* (5th ed. 2008) Appeal § 174, pp. 249-250.) The subdivision does not embrace garden variety orders made in the course of litigation, just because they are directed to a party or attorney. Were it otherwise, for example, discovery orders compelling responses or production would be appealable (but see Eisenberg, *supra*, ¶ 2:250, p. 2-120), and the limits of the collateral order doctrine would be superseded. While all injunctions are in personam orders, not all in personam orders are injunctions, appealable under Code of

Civil Procedure section 904.1, subdivision (a)(6). The accounting order is not an appealable order, and we dismiss the appeal from it.<sup>4</sup>

The credit order, however, is appealable, as a final collateral order. It required the payment of money, and it was final with respect to the subject matter, namely the disposition of Narghizian's credit against the constructive trust. As to that matter, nothing remained to be decided. All issues about the appropriateness of the constructive trust, and the dimensions of Narghizian's credit on account of it, had been resolved on appeal, and on remand the trial court had liquidated the credit to everyone's satisfaction. There remained only for it to be disbursed, presently or later.

Narghizian argues that present disbursement of his credit is not collateral, because it pertains to the constructive trust claim that formed part of the controversy at trial and on appeal. But neither the constructive trust nor the credit issues connected with it remain in the case. All have been resolved, and the portion of the July 28, 2008 order directing payment of the credit amount was the final step in that aspect of the case.

On the merits, Fabbio in essence contends that the proceeds from sale of the property that represented Narghizian's credit should not have been paid to him once the credit amount was ascertained, and the property was sold, but rather should have remained in Fabbio's counsel's trust account until the other remanded claims were determined, to be available for payment on account of the new judgment. There are several flaws in this contention.

First, the credit was distinct from the other causes of action and obligations in the case that await trial or retrial. As our prior decision stated, "The jury determined the transactions which resulted in the constructive trust on the . . . property and those which would be reviewed as a result of the Narghizian's request for an accounting arose from

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<sup>4</sup> Even had it been appealable, the accounting order was unexceptionable. Our prior decision left Fabbio's contribution to the accounting costs to the trial court's discretion. (Opn., 24, fn. 12.) There was no mandate to adjudicate Narghizian's ability to pay before directing Fabbio to do so provisionally.



separate and distinct events. On this point, we agree with the jury and do not find that these issues are intertwined in any manner which would require the determination of issues relating the constructive trust to await the results of the accounting.” (Opn., 13.)

Second, Narghizian’s credit was a credit against the constructive trust, not the judgment. True, the original judgment utilized what was then the credit to arrive at the net amount Narghizian owed Fabbio. But that judgment recognized and referred to the credit as a credit against the constructive trust, and so did the decision on appeal from the judgment. (Opn., 20-21.) When the constructive trust ended, and the property to which it attached sold, Fabbio realized the compensatory damage recovery for which the trust had been imposed – and an even greater amount in profit. That was also the time for Narghizian to receive his credit against the trust, for his personal investment in and for the property.

Fabbio contends that the trial court incorrectly deemed itself required by our opinion to order immediate disbursement of the credit. Although the opinion did not explicitly so direct, it contained language, such as that noted above, that could reasonably be construed as so counseling. But the trial court’s action was based, at bottom, on the emergent situation after remand, wherein the property had been sold, and Fabbio had realized enough both to compensate himself and pay Narghizian’s entitlement. The court’s reaction to that situation neither mistook our decision nor violated it. It was an appropriate response to the facts presented.<sup>5</sup>

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<sup>5</sup> Fabbio also argues that the credit should have been retained as a source of payment for what he foresees as a substantial judgment in his favor on retrial. There is no inherent right to security for the claims at hand. (Cf. Code Civ. Proc., § 483.010, subd. (a).)

### **DISPOSITION**

The appeal from the order of October 29, 2008 is dismissed. The order of July 28, 2008, insofar as it requires Fabbio's counsel to disburse forthwith to Narghizian the sum of \$187,839.11, is affirmed. Narghizian shall recover costs on appeal.

LICHTMAN, J.\*

We concur:

BIGELOW, P. J.

RUBIN, J.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.